In the Supreme Court
OF THE
United States

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Nos. 86, 267

OCTOBER TERM, 1929

CARLEY & HAMILTON, INC.; EDWARD MALDE, doing business as A. B. C. TRANSFER & STORAGE COMPANY; S. BRIZZOLARA, etc., et al.,
86 *Appellants,*

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles, State of California.

GEO. T. COTTINGHAM and WILLIAM C. MEGINNES, doing business as CITY TRANSFER COMPANY, et al.,
267 *Appellants,*

vs.

FRANK G. SNOOK, as Chief of the Division of Motor Vehicles of the State of California and RAY L. RILEY, as State Controller of California.

Appeals from the District Court of the United States for the Northern District of California

APPELLANTS' PETITION FOR REHEARING.

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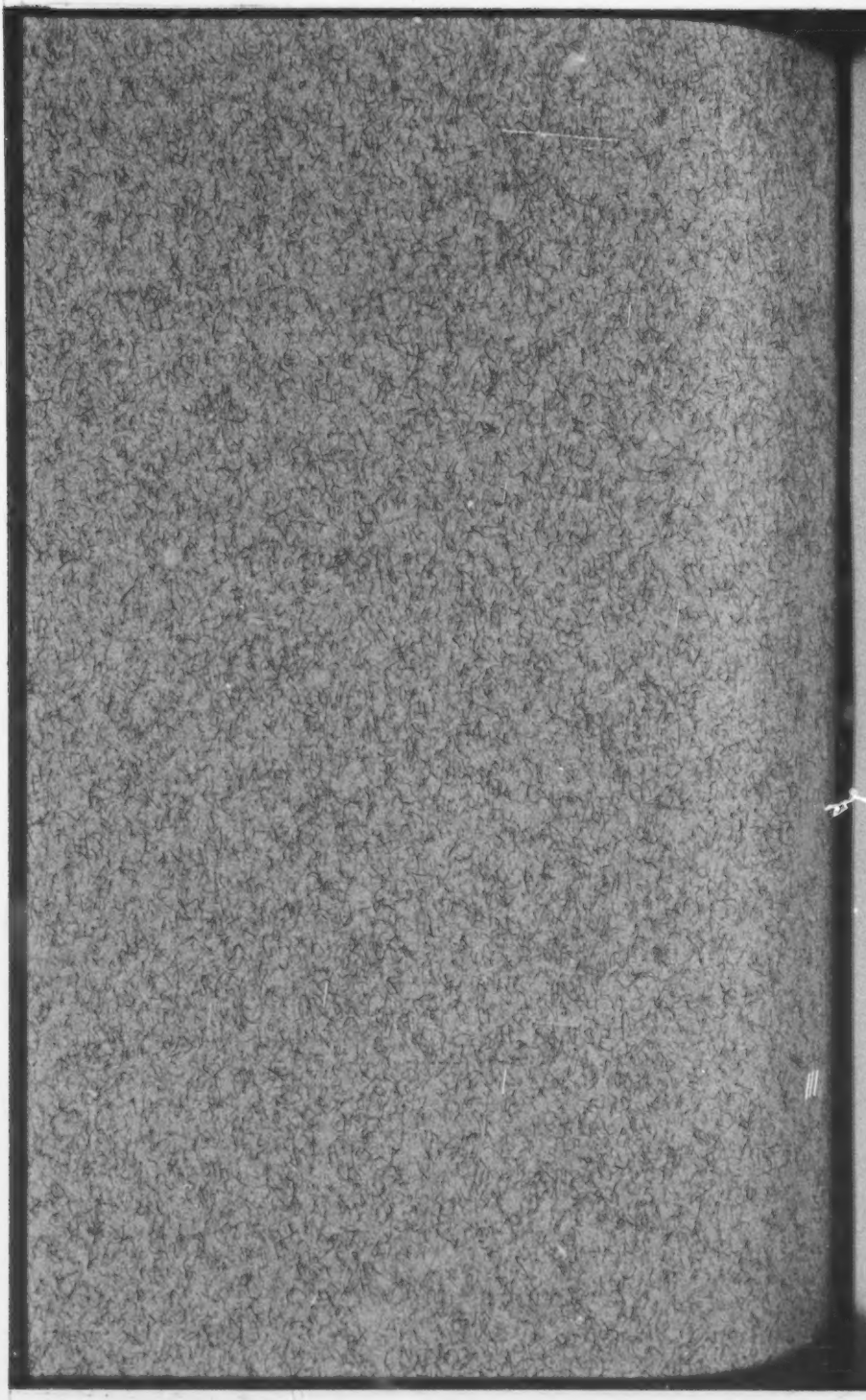

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APPELLANTS' PETITION FOR REHEARING.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the appellants in the above entitled causes and ask this Honorable Court for a rehearing of the above entitled causes and for a vacation of its certain decree made and entered on January 24th, 1930, and show:

I.

This Honorable Court has decided that all vehicles weighing, unladen, less than 3000 pounds, even though there is no limit to the size of their load, are properly exempted from the payment of weight fees and that the equal protection clause of the 14th Amendment and Section 21, of Art. I of the State Constitution do not protect the said appellants.

In delivering the opinion of this Court Mr. Justice Stone said:

> "That the Legislature may graduate the fees according to the propensities of the vehicles to injure or to destroy the public highways, and may exempt those with respect to which this tendency is slight or non-existent, cannot be doubted. We may not assume that vehicles weighing less than 3000 pounds, with loads which they usually carry, are not of this class, or that vehicles weighing more than 3000 pounds with their accustomed burden added do not have this tendency. It is for the Legislature to draw the line between the two classes."

It would appear that the Honorable Justice, as well as the other members of this Honorable Court, evidently overlooked certain portions of the transcripts and the briefs on such matter. It would be found that the Legis-

lature, in 1927, amended the registration fees named in Subdivision (c) by repealing the following:

> "For each such vehicle weighing, when unladen, less than 3000 pounds, $10.00."

By such amendment many thousands of vehicles transporting passengers for hire or property have been freed from said fees under said Subdivision (c), although said vehicles weigh more than 6000 pounds when loaded (R. p. 24, No. 86).

Again it is found in No. 267, Record, pages 5 and 6, that since December 31st, 1928, there are many thousands of motor vehicles, which weigh, when unladen, less than 3000 pounds, but carry more than 3000 pounds additional, making the total weight of more than 6000 pounds, and the owners thereof pay no charges under the amended registration fees, while they are in direct competition with the appellants and others. Said competition has already caused the plaintiffs and others a damage of more than $200,000.00; that every day said plaintiffs and said others are being so damaged and that they cannot recover any of said losses from said owners, who have been granted said privileges and immunities under the provisions of said Subdivision (c).

In No. 267, p. 25, it is shown that 130,125 vehicles weighing less than 3000 pounds paid under Subdivision (c) in 1928, $10.00 per vehicle, but since December 31st, 1928, no vehicles weighing less than 3000 pounds pay any charges under said Subdivision (c).

Your Honorable Court evidently overlooked the fact that Subdivision (b) provides that "for each such vehicle

weighing, when unladen, less than 6000 pounds—$50.00". In other words, electric vehicles used for the transportation of passengers for hire, or the transportation of property pay $50.00 even though the vehicle weighs less than 3000 pounds.

It cannot be assumed, as was stated in the opinion, that vehicles weighing less than 3000 pounds do not injure or destroy the public highways, and may therefore be exempted from the payment of any charge whatsoever.

We submit that the decisions cited by our brief found in pages 45-56 of No. 86 show that the appellants are being deprived of their rights under the 14th Amendment and the Constitution of California.

II.

This Honorable Court has decided that the registration fees under Subdivision (c) do not infringe upon those provisions of the Rural Post Roads Act and the Federal Highway Act prohibiting tolls of all kinds.

In delivering the opinion, Mr. Justice Stone said:

> "The fact that registration fees are imposed generally upon all residents who use motor vehicles within the State, without reference to any particular highways or to the extent or frequency of the use, and that, as in California, they are not exacted of non-resident automobilists passing through the state (1923 California Statutes, c. 266 S. 47), marks them as demands of sovereignty, not of proprietorship, and likens them to taxes rather than tolls. The fact that they may have been held justified, in other con-

nections, because of their similarity to 'tolls for the use of highways' affords no basis of saying that the present fees are prohibited tolls within the meaning of the Federal Highway Act."

In the first place, we call attention to the fact that said Section 47, Chapter 266, Statutes of 1923, was amended by the Legislature in 1927 (Statutes of 1927, Chapter 752), by adding the following, to-wit:

> "except that the privileges granted in this section shall not apply to any motor vehicle operated within this state for the transportation of persons or property for compensation".

As the principal reason set out in the opinion of your Honorable Court has been based on a Statute of 1923, which has been repealed by a Statute of 1927, the said Statute of 1923 cannot be the basis of the decision.

In the opinion it is said that because the appellants are compelled to pay such registration fees under Subdivision (c) without reference to any particular highways, or the extent or frequency of the use is a mark of the demands of sovereignty, not of proprietorship, in other words, a tax. No citation of any decision to support such announcement is given.

We cited a large number of cases in Pars. II and V in the brief in No. 86, and also in Pars. VII and VIII in No. 267. This Honorable Court has decided that the States, prior to the adoption by the State of the Post Rural Road Act of 1916, could raise money for the improvement of highways by tolls.

See *Kane v. New Jersey*, found on pages 22, 23 of the brief in No. 86. This case arose in the State Court and the Court held that the registration fee in New Jersey was a "toll", and necessarily it was not based upon the sovereignty of the State. The payment of the registration fee gave the right to use all the highways of New Jersey. This Honorable Court affirmed the decision.

In the *Hendricks v. Maryland*, this Honorable Court held that the registration fee of Maryland was a toll and not a tax, imposed by the State, although Hendricks had the right to use every highway in Maryland.

If the registration fees in Subdivisions (b) and (c) are taxes, then this Honorable Court will be compelled to reverse the said *Kane* and *Hendricks* cases, as a tax, impost or duty, or the commerce clause of the Constitution will be violated. For instance there are some persons who are using their motor vehicles for the transportation of passengers for hire or transporting property between California and Oregon, just like Kane and Hendricks. Will this Honorable Court decide that such subdivisions are taxes instead of tolls, and therefore in violation of the Commerce Clause?

As was said by Mr. Justice Field in delivering the opinion of the Court:

> "There is no analogy between the imposition of taxes and the levying of tolls for the improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of the government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of the

improvements and considerations of the return which such values or expenditures should yield. * * *

"And to meet the cost of such improvement, the states may levy a general tax or lay a toll upon all those who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. Huse v. Glover, 119 U. S. 543, 548 (30:487)."

Sands v. Manistee River Improvement Co., 123 U. S. 288, 294, 31 L. Ed. 149, 151.

In our briefs we cited the case of *Sprout v. South Bend.* In the opinion it was said that the proceeds from the license fees were not applied to the construction or maintenance of the city streets, and it compared *Tomlinson v. Indianapolis,* 144 Ind. 142, 36 L. R. A. 414, 43 N. E. 9; *Terre Haute v. Kersey,* 159 Ind. 300, 95 Am. St. Rep. 296, 64 N. E. 469; *Hogan v. Indianapolis,* 159 Ind. 523, 65 N. E. 525 (see No. 86, brief page 39). We refer to these cases in our brief No. 86, pages 30 and 31, in which the Supreme Court of Indiana decided that the registration fees are tolls.

The Justices of Massachusetts held that the registration fees in Massachusetts were tolls, whether or not the vehicles operated on any particular highway. The opinion cites a large number of cases including *Kane v. New Jersey, Standard Oil Company v. Brodie* and *Hendricks v. Maryland* (see No. 86, brief, pp. 28, 29 and 30).

We also cited three cases in different states holding that the registration fees were tolls, although there was only a charge for the use of all the highways (see No. 86, brief, p. 31).

We cited also the case of *Matter of Schuler* in No. 86, page 24. In the opinion the State Supreme Court relied upon the decision of the Supreme Court of Arkansas and in the opinion therein the license fees were tolls (see *Ft. Smith v. Scruggs*, No. 86, page 24).

Congress enacted the Rural Post Roads Act on July 11th, 1916 (Chap. 241, 39 Stat. at line 355). Congress before it enacted this Act, had before it all of the decisions of the Supreme Court, decisions of the courts of the various States, as well as the acts of Congress, and when Congress

> *"Provided, that all roads constructed under the provisions of this act shall be free from tolls of all kinds,"*

and also in Section 3 it is provided,

> *"That in states where the constitution prohibits the state from engaging in any work of internal improvement, then the amount of the appropriation under this act apportioned to any such state shall be turned over to the highway department of the state or to the governor of said state to be expended under the provisions of this act and under the rules and regulations of the Department of Agriculture,"* etc. * * *

its intention was plainly evident. When Congress amended the Post Roads Act by the Federal Highway Act the latter contained the same provisions.

In other words Congress informed the States that if a State wished to receive the benefit of Federal Aid, it must assent to the provisions of the Act, including the prohibition against "tolls of all kinds". California in 1917 did assent to be bound by the provisions of the Post Rural Roads Act, and therefore the State is com-

pelled to finance the construction of its highway system by bonds and the aid from the moneys allotted by Congress under the said Act. The State had already issued bonds in the amount of $18,000,000 for the acquisition of a system of State highways (Chap. 83, Stat. 1909). Again in 1915, $15,000,000 of bonds were issued for extensions of the original State highway system (Chap. 404, Stats. 1915). Section 2, Art. XVI of the Constitution was adopted at a special State election in 1919 (Chap. 46, Stats. 1919), and provided for a State bond issue of $40,000,000 for the construction of certain additional State highways.

Since then the State has never issued any further bond issues for the construction of any additional highways, or for the improvement of any highways in the State, but in 1923, the State enacted the "California Vehicle Act" of 1923 (Chap. 226, Stats. of 1923).

In 1916, the time of passage of the Post Road Act, the State received about $250,000 from the registration fees from about 180,000 motor vehicles. In the year 1930, the State will receive above $45,000,000 from the registration fees, and the Motor Fuel Act, not including other taxes which are imposed on 1,900,000 motor vehicles.

This Honorable Court held that:

> "There was no intention that the State would reap profit out of this grant by the Government, but the State was to profit from the construction of such internal improvements wholly within the State by the completion and operation of such canal."
>
> *U. S. v. Michigan*, see Brief in No. 267, pp. 33, 34.

We cited many decisions in our briefs No. 86 and No. 267 on this question, and we refer to our briefs on same.

In conclusion, we earnestly submit that this Honorable Court should vacate and set aside the decree entered on February 24th, 1930, and that the appellants in said causes shall be entitled to the relief asked for in their bills of complaint.

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Henry G. Hotchkiss,
Solicitors for Appellants.